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No. 220 5

In the Supreme Court of the United States

OCTOBER TERM, 1928

JOHN JOHNSON, PETITIONER

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction of this court	1
The question presented	2
Statement	2
Argument	4

CITATIONS

Atlee v. *Packet Co.*, 21 Wall. 389	5
Belden v. *Chase*, 150 U. S. 674	5
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372	4
John A. Roebling's Sons Co. v. *Erickson*, 261 Fed. 986	5
Panama R. R. Co. v. *Johnson* 264 U. S. 375	6
Swanson v. *Luckenbach S. S. Co., Inc.*, 17 F. (2d) 735	5
The Sudbury, 14 F. (2d) 533	5
Jones Act (U. S. C. Title 46, sec. 688)	4
Benedict's Admiralty (5th ed.), pp. 32, 33	4

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 223) is not reported. The charge to the jury by the District Judge appears at pages 196–211 of the record.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered March 26, 1928. (R. 225.) Petition for certiorari was filed in this case on June 22, 1928.

THE QUESTION PRESENTED

The question presented is whether one who has no contractual relation with a ship, being a mere licensee or invitee, and who is injured through failure of ship to provide a proper gangplank, is prevented by his contributory negligence from recovery in an action brought at law, or is entitled to an apportionment of damages.

STATEMENT

Johnson was injured by falling off a gangplank stretched between two vessels then lying in navigable waters at Jacksonville, as he was attempting to pass from one vessel to the other. He brought an action at law in the Supreme Court of the State of New York which was removed to the District Court of the United States for the Eastern District of New York. His complaint stated his status in relation to the vessels as follows (R. 4):

> That on or about the 1st of August, 1920, the Steamship *Jacksonville* was lying at the port of Jacksonville, Florida. That on or about that day, the plaintiff was invited by the boatswain of the Steamship *Jacksonville* to go on board the said vessel in order to procure or attempt to procure employment as a member of the crew of that vessel.

While leaving the vessel he fell in the water, sustaining his injuries. He had no contractual relation with the ship. The conclusive testimony is (Johnson, R. 53):

Q. Did you get a job on board the *Jacksonville* that day?

A. No.

Q. You never had a job on the *Jacksonville?*

A. No.

Q. Never were hired?

A. No.

Q. Never were employed on it?

A. No.

Q. You went on of your own accord—your own business?

A. With the boatswain to hire.

Q. You went on looking for a job?

A. Yes, sir.?

Q. You went on to get something for yourself, a job?

A. Yes, sir.

Q. You were out of a job at the time, weren't you?

A. Yes.

He was a licensee or invitee.

The sole question present is whether, being a licensee or invitee, his contributory negligence in an action at law bars recovery or requires an apportionment of the damages. The District Judge (Campbell, D. J.) regarded Johnson a licensee on the vessel (R. 210) and the Circuit Court of Appeals classes him an invitee (R. 223). Both courts held contributory negligence barred recovery whether he was considered a licensee or an invitee. The trial court charged the jury that the plaintiff

could not recover if guilty of contributory negligence (R. 200), and the jury found for the defendant.

The application made to this Court now suggests that Johnson is to be classed as a seaman, and the admiralty rule which apportions damages where there is contributory negligence should be applied.

ARGUMENT

Had petitioner had a contractual relation as seaman or stevedore with the ship, contributory negligence in a law action would not bar recovery but require an apportionment of the damages under the ruling of this Court in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, or under the provisions of the Jones Act (U. S. C. Title 46, Section 688). However, in the absence of such contractual relation, irrespective of the locality of the tort, contributory negligence is complete defense, and apportionment must be denied. The best statement or summary is made by Benedict's Admiralty (5th Ed., pp. 32, 33):

> Apart at least from an Act of Congress—and to avoid a question of its constitutionality, this will be construed if possible to intend a uniform rule at law and in admiralty—*the substantive rights conferred by maritime law must be recognized equally in an action brought at common law, whether in Federal or State courts, upon maritime contract or even for tort, where there is a contractual relation between the parties so that*

the contract contemplates the application of the maritime law to the breach of duty and the maritime law prescribes the measure of recovery and the apportionment of damages in case of contributory negligence. In the case of stevedores, though it has been said that even in admiralty the employer's liability is determined upon common law principles, the maritime rule that contributory negligence goes only to the reduction of damages must be applied in an action at law against the employer.

In actions in tort *between parties having no contractual relation the common law courts apply their own rules respecting the amount of recovery and the effect of contributory negligence.* Thus, in collision cases, the common law court applies the common law rule that joint fault bars recovery instead of the maritime rule of divided damages.[1] There is therefore a distinction between cases involving contractual relation and cases of simple tort independent of such relation. In cases of contractual relation even though of tortious injury, as there is but one contract, its effect should be the same in all courts and the measure and conditions of recovery which the contract contemplates should be applied alike at law and in ad-

[1] See *Belden* v. *Chase*, 150 U. S. 674; *Atlee* v. *Packet Co.*, 21 Wall. 389; *Swanson* v. *Luckenbach S. S. Co., Inc.*, (C. C. A. 9th Cir.) 17 F. (2d) 735; *The Sudbury* (D. C. Oregon), 14 F. (2d) 533; *John A. Roebling's Sons Co.* v. *Erickson*, 261 Fed. 986.

> miralty. *In cases, however, where there is no relation between the parties but that one has inflicted and the other sustained injury,* the courts have not to consider what obligation their contract contemplated but only what redress justice requires and *different courts may follow variant notions of what is* just. (Italics ours.)

The Act referred to was the Jones Act, the constitutionality of which lately was settled by this Court in *Panama Railroad Company* v. *Johnson,* 264 U. S. 375. The application of that Act rests upon the relation of employer and employee, as the general rule requires. The wording is:

> Any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in the case of personal injury to railway employees shall apply; * * *. (Italics ours.)

The examination of each case cited by the petition definitely establishes that the admiralty rule for apportionment of damages in tort matters applies only where there is a contractual relation, such as seaman or stevedore, existing between the person injured and the owner of the vessel or other defendant in suit. In this analysis it thus follows that the ruling of both lower courts was correct and

the present application is without merit. The petition should be denied.

Respectfully submitted,

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